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In The

Supreme Court of the United States

GEORGE SEFERI ET AL,

Appellants

vs.

HOWARD S. IVES, STATE HIGHWAY COMMISSIONER.

Appellee

On Appeal from The Supreme Court of the State of Connecticut

JURISDICTIONAL STATEMENT.

ALBERT L. COLES,

Attorney for Appellants,
855 Main Street,
Bridgeport, Connecticut.

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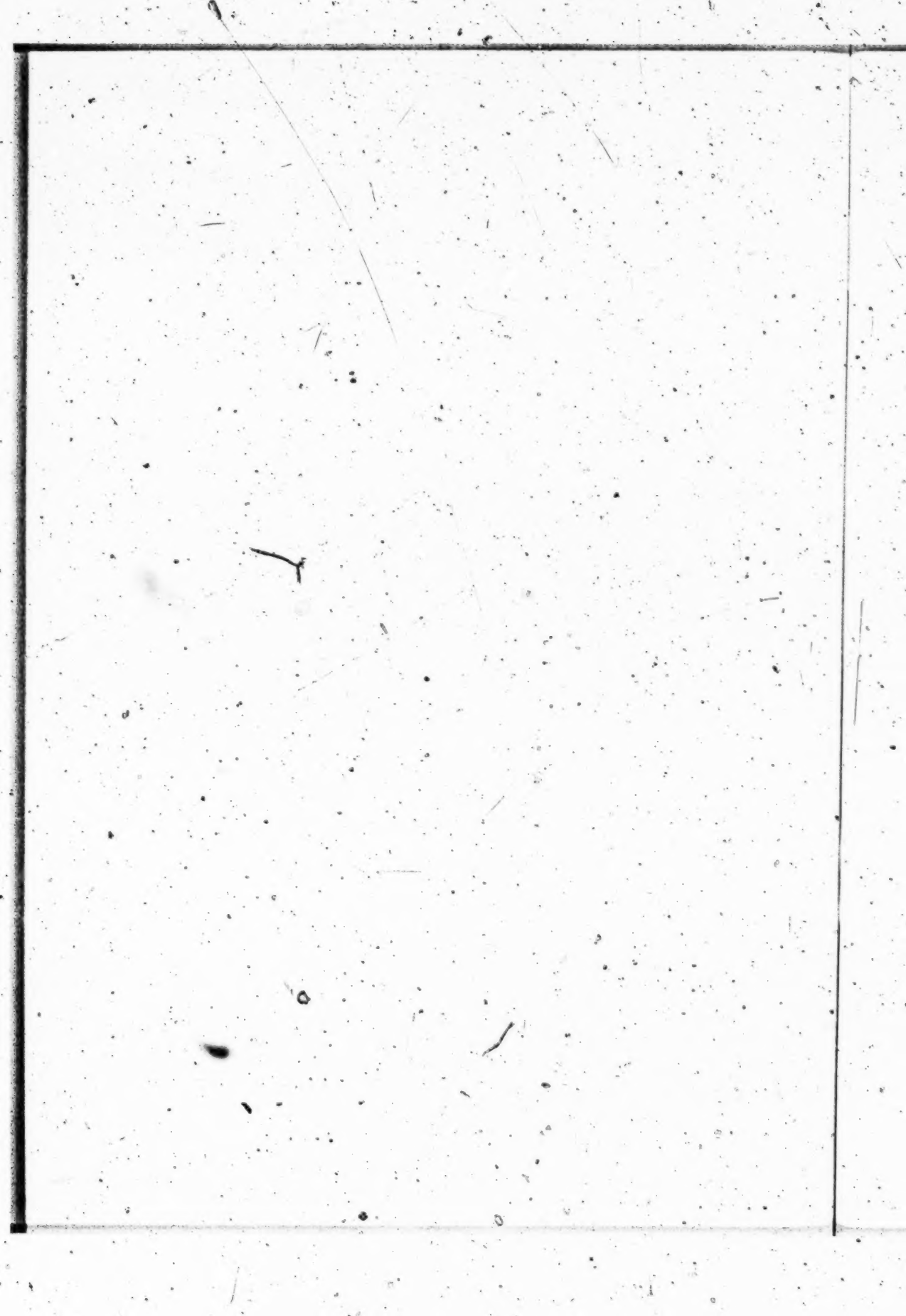

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vs.

HOWARD S. IVES, STATE HIGHWAY COMMISSIONER.

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On Appeal from The Supreme Court of the State of Connecticut

JURISDICTIONAL STATEMENT.

I.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final judgment of the Superior Court for Fairfield County entered on January 19, 1968 in accordance with the decree of the Supreme Court of the State of Connecticut entered on November 21, 1967, setting aside a judgment of the Superior Court for Fairfield County and ordering final judgment that the damages to which the appellants are entitled are $139,000, not $188,000, and on which the appellants motion for permission to reargue the case was denied by the Supreme Court of the State of Connecticut on December 19, 1967. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

II.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Connecticut is reported in 155 Conn., — 236 A.2d 83 (1967). A copy of the opinion is attached hereto as Appendix A. The opinion of the Superior Court for Fairfield County from which the appellee herein appealed to the Supreme Court of Connecticut, is not reported, but a copy thereof is set forth in Appendix B.

III.

JURISDICTION.

Section 13a-73b, Connecticut General Statutes, authorizes the highway commissioner of the State of Connecticut to take any land he finds necessary for the layout or improvement of any state highway, and it provides that the owner of such land shall be paid by the state for all damages resulting from the taking. An assessment of damages is made by the highway commissioner, and it is filed by him with the clerk of the superior court in the county in which the land is located. Section 13a-76 set out in appendix G, permits any person aggrieved by the assessment of damages by the highway commissioner for the taking to apply to the superior court for the county in which such land is situated for a reassessment of the damages.

Such an application was made by the appellants in this proceeding.

The judgment of the Supreme Court of the State of Connecticut was entered on November 21, 1967 and announced on December 5, 1967. Appellants' Motion to Reargue was filed on December 11, 1967 and the final decree of the Supreme Court of the State of Connecticut denying appellants' Motion to Reargue was entered on December 19, 1967. Final judgment in accordance with the opinion of the Supreme Court of the State of Connecticut was entered by the Superior Court for Fairfield County on January 19, 1968.

Notice of Appeal was filed in the Supreme Court

of the State of Connecticut on February 28, 1968 with proof of service on all parties.

The jurisdiction of the Supreme Court of the United States to review this judgment on direct appeal is conferred by Title 28, United States Code, Section 1257(2). **Robinson v. California,** 370 U.S. 660, 664 (1962). If the second question presented were the sole question sought to be reviewed, it would properly be the subject of a petition for certiorari, conferred by Title 28, United States Code, Section 1257(3). Under the circumstances of this case, jurisdiction to review the latter question on direct appeal is sustained by **Flourney v. Winer,** 321 U. S. 253, 263 (1944).

IV.

QUESTIONS PRESENTED.

1. Whether or not Section 13a-73b of the Connecticut General Statutes, authorizing the highway commissioner to take any land he may find necessary for the layout of any trunkline highway, and to pay the owner all damages, violates the Fifth and Fourteenth Amendments to the Constitution of the United States when it is construed by the Supreme Court of the State of Connecticut to preclude an award of damages for the value of an immovable business destroyed as a result of the condemnation?

2. Whether or not the Fifth and Fourteenth Amendments to the Constitution of the United States require the State of Connecticut to award damages to the appellants for the value of their business de-

stroyed as a result of the exercise by the state of its power of eminent domain?

V.

STATUTES INVOLVED.

1. The statute involved is Section 13a-73b of the Connecticut General Statutes and it is set out in Appendix F.

2. The provisions of the Constitution of the United States relied upon are portions of the Fifth and Fourteenth Amendments set out in Appendix H.

VI.

STATEMENT.

A. FACTS:

On August 20, 1965, pursuant to the provisions of Section 13a-73b of the Connecticut General Statutes, Howard S. Ives, Highway Commissioner of the State of Connecticut, took the property owned by George, Nicola, and Peter Seferi, together with all buildings and appurtenances, known as 599 Lafayette Street, Bridgeport, for the relocation of Route 25, Bridgeport-Newtown Road, and assessed damages in the sum of $83,600. Pursuant to Section 13a-76 of the General Statutes, the appellants appealed from the assessment.

Hon. Samuel Mellitz, State Referee, to whom the appeal was referred, filed his report on August 30,

1966. The following undisputed facts were found by the referee (Record, pp. 4-5):

1. At the time of the taking the plaintiffs conducted a retail supermarket business in the building on the property.

2. The gross annual receipts from this business were $430,000, the annual net profit was approximately $40,000, and the value of the business was $42,500.

3. Although moving costs, if this business could be moved, would be $10,171, there was no location or site anywhere in the area which the plaintiffs could acquire and to which they could move their business, including fixtures and equipment.

4. Because the plaintiffs could not move their business they lost $16,344 worth of movable fixtures.

The referee found in the alternative. He assessed damages at $139,000, taking into account moving costs of $10,171; in the alternative he assessed damages at $188,000 if the appellants were entitled to be compensated for the value of the business and fixtures lost in addition to the value of the land and buildings.

The Superior Court for Fairfield County accepted the report of the referee and in an opinion filed on December 8, 1966, set out in Appendix B, assessed damages to the appellants in the sum of $188,000. The highway commissioner appealed this decision to the Supreme Court of the State of Connecticut. In

the opinion set out in Appendix A, the Supreme Court set aside the judgment of the Superior Court, it remanded the case, and it directed that the damages be assessed at $139,000. Thereafter the appellants filed with the Supreme Court, their Motion to Reargue, Appendix C, limited to their constitutional claims. On December 19, 1967, the Supreme Court denied this Motion to Reargue. Final judgment was entered in the Superior Court for Fairfield County on January 19, 1968, from which this appeal is taken.

B. PRESENTATION OF THE FEDERAL QUESTIONS:

The application of the appellants in the Superior Court, filed in accordance with Section 13a-76 followed the language of the statutes and it recited that the appellants were aggrieved by the assessment of damages by the highway commissioner in the sum of $83,600.

The federal question was first raised before the Hon. Samuel Mellitz, State Referee, to whom the issue was referred by the Superior Court. The fedral claim was made orally, and in support of the contention of the appellants that they were entitled to recovery for the value of their business and fixtures. As a result of the assertion that a failure to make an allowance in the assessment of damages for these items would violate the Fifth and Fourteenth Amendments to the Constitution of the United States, the referee included them in the alternative. Record, pp. 4-6.

Motions for acceptance of the report of the state

referee were filed by both parties, Record, pp. 6-7, and at the hearing conducted by the Hon. Anthony J. Armentano, Judge of the Superior Court, the federal questions were again raised. Judge Armentano recognized the claim of the appellants in his Memorandum of Decision awarding damages in the larger amount, $188,000. Record, pp. 7-8.

The appellants pursued their federal claims in the Supreme Court of Connecticut in their brief and in oral argument, as follows (Brief, p. 14):

> "Finally, under any theory for payment of just compensation to the plaintiffs, by virtue of the provisions of Article First, Section 11 of the Connecticut Constitution and the Fifth Amendment to the United States Constitution, the plaintiffs must be paid for all of their property taken from them by the State of Connecticut."

The Motion to Reargue the decision of the Supreme Court, Appendix C, was specifically addressed to the federal issues as follows:

> "The appellees in the above-entitled action respectfully move this court for permission to reargue, limited to the question presented in the record as to whether or not Section 13a-73b of the General Statutes, as applied, violates the Fifth and Fourteenth Amendments to the United States Constitution.
>
> "In awarding damages to the appellees, the trial court relied upon the Fifth and Fourteenth Amendments to the United States Constitution. The appellees claimed in their brief to this Court that the Fifth Amendment to the United States

Constitution required that they be compensated for all of the loss occasioned by the Highway Commissioner's taking of their property. The validity of Section 13a-73b as applied in prior decisions of this court was drawn into question. The appellees respectfully represent that implicit in the decision of the court in the instant case is the construction of Section 13a-73b of the General Statutes which is contrary to that which the trial court and the appellees have asserted is required by the Fifth and Fourteenth Amendments to the United States Constitution.

"Since the decision of this court announced December 5, 1967, did not discuss the effect of the United States Constitution upon Section 13a-73b of the General Statutes nor indicate that this aspect of the appellees' argument had been considered, the appellees respectfully request an opportunity to reargue before this court in order that the decision in the above-entitled action might be reconsidered in light of the mandates of the Fifth and Fourteenth Amendments to the United States Constitution."

VII.

THE QUESTIONS ARE SUBSTANTIAL.

Section 13a-73b of the Connecticut General Statutes is the state's only legislation enabling highway condemnation and requiring the payment of all damages to the owner of the condemned land. As construed and applied by the Connecticut Supreme Court, the statute precludes an award of damages

for the loss of a business. It is the contention of the appellants that the Fifth and Fourteenth Amendments to the Constitution of the United States require the State of Connecticut to pay to the owner the value of a business destroyed as a result of a condemnation.

Decided cases are generally opposed to the contentions of the appellants. Decisions of this court and lesser tribunals reiterate the general rule. The loss of a business is considered "consequential" damage and, therefore, courts have not required the condemnor to compensate the owner for his loss. **United States v. General Motors Corp.**, 323 U. S. 373 (1945).

The reasons purporting to support the general rule denying compensation for the loss of a business, sometimes termed "good-will", are as follows:

a. Neither the business nor the good-will are taken pursuant to a condemnation of land.

b. Damage to a business is **damnum absque injuria.**

c. A business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution protects.

d. The loss of a business was not within the contemplation of the eminent domain clause of the constitution. 4 Nichols, **Eminent Domain** § 13.3, pp. 444-42 (3rd. ed. 1962).

The appellants contend that this rule is archaic, illogical, and unjust; that the reasons for the rule, if ever valid, no longer obtain; and that modern con-

cepts of the term "property" dictate a more equitable interpretation of constitutional provisions "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." **Armstrong v. United States,** 364 U.S. 40, 49 (1960). They maintain that it is not constitutionally permissible for a governmental unit to destroy private property without paying just compensation to the owner thereof.

A person's business is a property right. **Truax v. Corrigan,** 257 U.S. 312, 327 (1921); **Duplex Printing Press Co. v. Deering,** 254 U.S. 443, 465 (1921). The Constitution makes no distinction between real and personal property taken for public use. **Heflebower v. United States,** 21 Ct. Cl. 228 (1886). An owner whose property is destroyed is entitled to compensation as to both real and personal property because in either case there is a "taking" for which the Fifth Amendment requires just compensation. **Causby v. United States,** 75 F. Supp. 262, 109 Ct. Cl. 768 (1948). The Amendment's protection is not altered by the fact that the property taken is intangible. **Kimball Laundry Co. v. United States,** 338 U.S. 1 (1948). The requirement in the Fifth Amendment of just compensation for the taking of private property for public use applies to the states, and it is incorporated into the meaning of "due process" required by the Fourteenth Amendment. **Foster v. City of Detroit, Michigan,** 254 F. Supp. 655 (D.C. Mich. 1966).

In view of the obvious growth of government on all levels, the extension of governmental activities into spheres formerly reserved for private enterprise, the increase in government spending in the

customary areas of national defense, highway construction, urban renewal, and, more recently, the growing number of states adopting open space programs to conserve land for public parks, it is clear that the importance of awarding "just compensation" in condemnation cases shall become vitally important to a broader segment of the public. See Report of Committee on Public Works, 88th Cong., 2d Sess., **Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federal and Federally Assisted Programs,** (Committee Print No. 31, 1964) indicating the overwhelming extent of the acquisition for federal and federally assisted state and local programs.

Text writers and scholars have long noted the inequities and injustices brought about by incidental or *consequential losses resulting from condemnation* proceedings.[1] The Harvard Student Legislative Research Bureau has proposed model legislation entitled "An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings," 3 **Harvard Journal on Legislation** 445 (1966).

Legislatures, too, have recognized the inequity facing some property owners as the result of condemnations. A gradual liberalizing of the harsh rules characterizing the common law of eminent domain

[1]See Slavitt, "Inequities and Injustices of Condemnation Acquisitions," 40 **Conn. B. J.** 11 (1966) and authorities cited in note 1 therein; Helstad, "Recent Trends in Highway Condemnation Law," **Wash. U. L. Q.** p. 58 (Feb. 1964); Spies & McCoid, II, "Recovery of Consequential Damages in Eminent Domain," 48 **Va. L. Rev.** 437 (1962); Note, "Compensation for Public Use — Congressional Action and the Fifth Amendment," 32 **Tenn. L. Rev.** 615 (1965).

is evidenced by the legislative changes which have occurred.[2]

It is clear that the question of "just compensation" in condemnation proceedings has been the subject of widespread consideration by both legislators and scholars.

Finally, the apt words of this court in **Olson v. United States,** 292 U.S. 246 (1934) well summarize and support the appellants' contention that the questions presented herein are so substantial as to require plenary consideration, with briefs on the merits and oral arguments for their resolution.

> "The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in **Monogahela Navigation v. United States,** 148 U. S. 312, 324: 'In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes.

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[2]See statutes cited in Slavitt, **supra** at notes 28 and 29; 26 **Penn. Stat. Ann.** §§ 1-601 through 1-614 (Purdon, 1964); **Conn. Pub. Acts** (1967) Nos. 108 and 598.

Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 299." **Id.** at 254-255.

VIII.

CONCLUSION.

The questions presented by the appellants are substantial. As a direct consequence of the taking of their real property, the State of Connecticut took from the Seferi brothers another most valuable property, their supermarket business and its fixtures. It is true that the State of Connecticut did not thereafter conduct the business or physically use the equipment, but the appellants were deprived of their personal property by the action of the state.

The Supreme Court of the State of Connecticut refused to agree that the State of Connecticut should be required to pay for those properties. We submit that the Constitution of the United States protects the Seferi brothers under these circumstances and that the taking violated their rights. We believe also that the Supreme Court of Connecticut should have interpreted Section 13a-73b to include the value of the Seferi business and its fixtures as damages for which the Seferi brothers were entitled to be paid just compensation.

Respectfully Submitted,

ALBERT L. COLES,
COLES, O'CONNELL & DOLAN,
Bridgeport, Conn.,
Attorneys for the Appellants.

APPENDIX A

OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT.

House, J. The facts in this case are not in dispute. In 1965 the defendant, the highway commissioner, acting pursuant to No. 309 of the 1965 Public Acts, February Special Session (now General Statutes [Rev. to 1966] § 13a-73 (b)), acquired the land of the plaintiffs for highway purposes and assessed as damages to the plaintiffs the sum of $83,600. The owners appealed from the assessment of damages, claiming that they were inadequate, and the appeal was referred to a state referee, whose finding has not been attacked.

The referee reported that the property taken consisted of an area of 15,000 square feet on which there was a one-story, masonry and frame building in which the plaintiffs conducted a retail supermarket. The value of the business at the time of the taking was $42,500, and the moving costs, if the business could be moved to another location in the area, would amount to $10,171. There is no location or site anywhere in the area which the plaintiffs could acquire and on which they could erect a building into which they could move their business, including fixtures and equipment. The value of moveable fixtures which the plaintiffs will lose by not being able to move their business amounts to $16,364. The referee found that, taking into account the moving costs of $10,171, the damages sustained by the plaintiffs by reason of the taking were $139,000. In the alternative, he found that, if, as a

matter of law, the plaintiffs were entitled to compensation for the value of the business and fixtures as he had found their separate values to be, the damages sustained by the plaintiffs amounted to $188,000. The defendant moved to accept the report in accordance with the finding assessing damages at $139,000, and the plaintiffs moved that it be accepted in accordance with the alternative finding assessing the damages at $188,000. The court accepted the report and rendered judgment for the plaintiffs on the alternative assessment of damages at $188,000. From this judgment the defendant has appealed.

By including in the award a separate allowance for the value of the business conducted on the premises taken, where the condemning authority did not take the business as it did in such cases as **Kimball Laundry Co. v. United States,** 338 U.S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765, the court departed from the established rule for the assessment of damages in eminent domain proceedings.

As we said in **Housing Authority v. Lustig,** 139 Conn. 73, 75, 90 A.2d 169: "It is the general rule that when real property is the only subject of condemnation nothing should be included in the damages for the loss of a business conducted upon the property unless the statute specifically authorizes it. . . . [p. 76] In a case such as the present, where an entire piece of property is taken, the proper measure of damages is the fair market value of the real property. We said in **Andrews v. Cox,** 127 Conn. 455, 457, 17 A.2d 507: 'Generally speaking, market value is "the price that would in all probability—the prob-

ability being based upon the evidence in the case—result from fair negotiations, where the seller is willing to sell and the buyer desires to buy." **Portland Silk Co. v. Middletown,** 125 Conn. 172, 174, 4 Atl. (2d) 422. From this it follows that in determining market values in awarding damages for land taken, it is proper to consider all those elements which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land; . . . unless, indeed, the considerations advanced are not a necessary, natural or proximate result of the taking . . . The determination of the damages to be paid requires the consideration of "everything by which the value is legitimately affected"; **Holley v. Torrington,** 63 Conn. 426, 433, 28 Atl. 613; . . .' The fair market value of a piece of real property should be determined in the light of the use to which it is being put or the use to which it could be put most advantageously. **New York, N. H. & H. R. Co. v. New Haven,** 81 Conn. 581, 585, 71 A. 780; **Campbell v. New Haven,** 101 Conn. 173 180, 125 A. 650. Accordingly, the better reasoned cases hold that, although the value of a business which is being conducted upon the real property condemned may not ordinarily be added to the market value of the realty as damages for the taking, the fact that a given business is in operation on the property should be taken into consideration in determining the market value of the real property if in truth it is a factor in establishing that market value—if, that is, the use of the real property for that purpose enhances the value of it. **Edmands v. Boston,** 108 Mass. 535, 549; **King v. Minneapolis Union Ry. Co.,** 32 Minn. 224, 226, 20 N.W. 135; **Pittsburgh, V. & C. Ry Co. v. Vance,** 115 Pa. 325, 334, 8 A. 764; **Chairman of Highway Com-**

mission v. Parker, 147 Va. 25, 29, 136 S.E. 496; **Voigt v. Milwaukee County,** 158 Wis. 666, 670, 149 N.W. 392. In particular, it is proper to take into consideration the existence of a going business on the land in question as indicative of the highest economic use to which the land may be put. **State v. Carrow,** 57 Ariz. 429, 433, 114 P.2d 891; **Philbrook v. Berlin-Shelburne Power Co.,** 75 N.H. 599, 74 A. 873; **Hunter's Administrator v. Chesapeake & O. Ry. Co.,** 107 Va. 158, 165, 59 S.E. 415."

This is the rule of damages which we have consistently followed. See **Stanley Works v. New Britain Redevelopment Agency,** 155 Conn. 86, 102, 230 A.2d 9; **DelVecchio v. New Haven Redevelopment Agency,** 147 Conn. 362, 363, 161 A.2d 190; **Humphrey v. Argraves,** 145 Conn. 350, 353, 143 A.2d 432; **Harvey Textile Co. v. Hill,** 135 Conn. 686, 689, 67 A.2d 851. It is in accord with the view of most authorities that injury to or even the destruction of a business conducted on land taken by eminent domain is not to be considered a separate element of damage in the condemnation proceeding although the special value of land owing to its adaptability for use in a particular business is an element which the owner of land is entitled to have considered in the determination of the amount to be paid as just compensation for the taking of the land. In addition to the cases cited above, see, **United States v. General Motors Corporation,** 323 U.S. 373, 383, 65 S. Ct. 357, 89 L. Ed. 311; **Mitchell v. United States,** 267 U.S. 341, 344, 45 S. Ct. 293, 69 L. Ed. 644; **Joslin Co. v. Providence,** 262 U.S. 668, 675, 43 S. Ct. 684, 67 L. Ed. 1167; 1 Orgel, Valuation under Eminent Domain (2d Ed.) §§ 75, 78; 4 Nichols, Eminent

Domain (3d Ed.) § 13.3; 27 Am. Jur. 2d, Eminent Domain, § 285; comment, "Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses," 67 Yale L.J. 61, 74.

There is nothing in this case which requires a change in our established rule. This is so even if the plaintiffs were correct in their claim that the referee's finding that "[t]here is no location or site anywhere in the area which the plaintiffs could acquire and upon which they could erect a building to which they could move their business" is the equivalent of a finding that the plaintiffs could not move their retail business to any other location whatsoever.

There is error, the judgment is set aside and the case is remanded with direction to render judgment that the damages to which the plaintiffs are entitled are $139,000, not $188,000.

In this opinion the other judges concurred.

APPENDIX B

OPINION OF THE SUPERIOR COURT FOR FAIRFIELD COUNTY.

In this action, the plaintiffs have appealed from the assessment of damages for land taking by the highway commissioner. The matter was referred to a referee. The referee found that (1) the plaintiffs conducted a retail supermarket on the site taken; (2) there is no location or site anywhere in the area which the plaintiffs could acquire and upon which they could erect a building to which they could move their business, including fixtures and equipment; (3) the value of the business at the time of taking is $42,500. and; (4) the value of moveable fixtures which the plaintiffs would lose by not being able to move their business amounts to $16,364. It is the contention of the plaintiffs that they are entitled to compensation for the value of the business and fixtures, in addition to compensation for the land and improvements thereon by the defendant, in which event, the alternative damages found by the referee (paragraph 8 of his report) would be $188,000. It is the contention of the defendant that the plaintiffs are not entitled to the value of the business and fixtures, in which event, the alternative damages found by the referee (paragraph 7 of his report) would be $139,000.

Article First, Section 11 of the Constitution of Connecticut provides "The property of no person shall be taken for public use, without just compensation therefor." A similar provision is contained in the Fifth Amendment of the Constitution of the

United States of America. The Fifth and Fourteenth Amendments of the federal constitution also provides that no person shall be deprived of property without due process of law. What is the just compensation due the plaintiffs? "The question of what is just compensation is an equitable one rather than a strict legal or technical one. The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken." **Colaluca v. Ives,** 150 Conn. 521, 530; **Winchester v. Cox,** 129 Conn. 106, 114. In the present matter, the referee found that there was no location or site anywhere in the area to which the plaintiffs could move their business. A business which cannot relocate, cannot survive and must, of necessity, go out of existence. When the land and building thereon were taken by the defendant, the life of the business, as a real and practical matter, was also taken. The same can be said of the moveable fixtures. "Damages are measured by the loss to the owner, not by the gain to the taker." **Robert v. New York City,** 295 U.S. 264, 282; **United States ex rel T.V.A. v. Powelson,** 219 U.S. 266, 281. The plaintiffs have suffered the loss of their business and fixtures by the taking of the defendant. Destruction is tantamount to taking. They are entitled to just compensation. It would be inequitable and an unsatisfactory result, if the value of a going business and moveable fixtures can be totally destroyed without any compensation because in a narrow sense of that word, they had not been taken for public use.

Section 13a-73(b) of the General Statutes provides "The commissioner may take any land he finds

necessary for the layout . . . of any state highway and the owner of such land shall be paid by the State for all damages." This statute, which implements the constitution provisions as applied to takings by the highway commissioner, is very broad. It provides for the payment of "all damages." The word "all" means "the whole of." Webster's New International Dictionary, Second Edition. Giving this statute its broadest, liberal interpretation and construction in favor of the plaintiffs, whose property is vitally affected, the highway commission may take land and the State pay for "all damages" proximately and directly the result of the taking of the land. The taking of the land forced and caused the plaintiffs to attempt to relocate their business, which the referee found they could not do. The direct result of the taking being damages (loss of business and moveable fixtures) to the plaintiffs.

The highway commissioner took the land of the plaintiffs. Since the statute provides for the recovery of "all damages," the determination of the damages to be paid required the consideration of everything by which the value was legitimately affected. **Altman v. Hill,** 144 Conn. 233; **Harvey Textile v. Hill,** 135 Conn. 686. Market value is a measure of damages to be considered. "Generally speaking, the market value is the price that would in all probability — the probability being based upon the evidence in the case — result from negotiations, where the seller is willing to sell and the buyer desires to buy." **Portland Silk Co. v. Middletown,** 125 Conn. 172, 174; **Andrew v. Cox,** 127 Conn. 455, 457. "From this it follows that in determining market values in awarding damages for land taken, it is proper to consider all those ele-

ments which an owner or a prospective purchaser could reasonably urge as affecting the fair price of the land; . . . unless, indeed the considerations advanced are not a necessary, natural or proximate result of the taking." The fair market value of a piece of real property should be determined in the light of the use to which it is being put or the use to which it could be put advantageously." **Housing Authority v. Lustig,** 139 Conn. 73, 76. In view of the finding of the referee that there is no location or site anywhere in the area which the plaintiffs can move their business, including fixtures and equipment, the plaintiffs would be extremely reluctant to sell unless the selling price of the land included an amount for the business and an amount for the moveable fixtures which they would lose by not being able to move their business. The moving of the business and fixtures would be a necessary result of the taking. This would be a controlling factor in determining the market value of the land, with the improvements thereon. Reason would dictate that without these items included in the gross sales price, the plaintiffs would be no willing seller. The referee did more than merely consider these items and add them to the market value of the land. He found them to be a fact and gave them a fair value as separate items. It is illogical to say that he can consider them but cannot find a fair value for each of them. Both roads lead to the same result.

Again, market value is not always the true test. The market value might fall short of the just compensation where the situation is of a unique nature and the business cannot be located elsewhere. **Suffield v. Thompsonville Bridge Co.,** 82 Conn. 460. Just

compensation means a fair equivalent in money for the property taken from the condemnee as nearly as its nature will permit. In the present matter, the referee found the amount of the alternative damages in paragraph 8 of his report to be $188,000.

Accordingly, for the foregoing reasons, the report of the referee is accepted and judgment be entered thereon in accordance with the findings set forth in paragraph 8 thereof, assessing damages to the plaintiffs at $188,000.

A. J. ARMENTANO. Judge.

Filed Dec. 8, 1965. (sic)

APPENDIX C

MOTION TO REARGUE.

The appellees in the above-entitled action, respectfully move this court for permission to reargue, limited to the question presented in the record as to whether or not Section 13a-73b of the General Statutes, as applied, violates the Fifth and Fourteenth Amendments to the United States Constitution.

In awarding damages to the appellees, the trial court relied upon the Fifth and Fourteenth Amendments to the United States Constitution. The appellees claimed in their brief to this court that the Fifth Amendment to the United States Constitution required that they be compensated for all of the loss occasioned by the Highway Commissioner's taking of their property. The validity of Section 13a-73b as applied in prior decisions of this court was drawn into question. The appellees respectfully represent that implicit in the decision of the court in the instant case is the construction of Section 13a-73b of the General Statutes which is contrary to that which the trial court and the appellees have asserted is required by the Fifth and Fourteenth Amendments to the United States Constitution.

Since the decision of this court announced December 5, 1967, did not discuss the effect of the United States Constitution upon Section 13a-73b of the General Statutes nor indicate that this aspect of the appellees' argument had been considered, the appellees respectfully request an opportunity to reargue before this court in order that the decision in the

above-entitled action might be reconsidered in light of the mandates of the Fifth and Fourteenth Amendments to the United States Constitution.

The Appellees,

By COLES, O'CONNELL
& DOLAN,
Their Attorneys.

APPENDIX D

DENIAL OF MOTION TO REARGUE.

"December 19, 1967.

The motion by the plaintiffs for reargument is denied.

By the Court,
ALCORN,
Acting Chief Justice"

APPENDIX E

JUDGMENT OF SUPERIOR COURT FOR FAIRFIELD COUNTY.

This appeal by the plaintiff, dated August 24, 1965, from the appraisal of damages by the defendant, for the taking of certain land owned by the plaintiff, situated in the City of Bridgeport, County of Fairfield, State of Connecticut, on the Southwesterly side of Lafayette Street and bounded:

Northeasterly:	by Lafayette Street, 105 feet, more or less;
Southeasterly:	by land now or formerly of Frank L. Pinto, Jr., 145 feet;
Southwesterly:	by lands now or formerly of Wheeler Enterprises Incorporated and Frate Incorporated (each in part) 105 feet;
Northwesterly:	by land now or formerly of Stanislaw Jaworowski, et al, 143 feet 6 inches;

Together with all buildings and appurtenances, being the same premises as contained in two (2) certain instruments namely, a Quit Claim Deed dated November 8, 1955 and a Quit Claim Deed dated Ocober 3, 1962, and recorded in Volume 1102, Page 562 and Volume 1249, Page 17 respectively, of the Town of Bridgeport Land Records.

for the taking of which said defendant appraised the damages due the plaintiffs to be $83,600.00 and praying that the damages be reappraised, came to this

Court on the First Tuesday of Sept., 1965, the defendant having deposited on 8/20/65 with said Clerk the sum of $83,600.00 to the use of the persons entitled thereto, and said action came thence to Sept. 24, 1965, when, notice of the pendency of said appeal having been given to said defendant, the Court referred said appeal to the Hon. Samuel Mellitz, a State Referee, to make a reassessment of damages and report to this Court, and thence to August 30, 1965, when said Referee filed his report (finding damages in the alternative of $139,000.00 or $188,000.00), and thence to September 30, 1966 when the parties appeared and were heard by the Court on the plaintiffs' motion for the acceptance of said report and for the entry of judgment in accordance with the same.

The Court, having heard the parties on said motion and report, accepted the report of said Referee (Second Alternative) on December 8, 1966, found that the amount due to the plaintiffs as damages for the taking of said land was $188,000.00, that the sum of $83,600.00 had been deposited by the defendant for the use of persons entitled thereto on account of the just compensation to be awarded, that the amount of the deficiency between the compensation finally awarded and the amount of money so deposited was $104,400.00, that the sum of $8,143.20 was due the plaintiffs as interest, and that the sum of $2,300.00, was a reasonable amount to award the plaintiffs as appraisal fees.

Thence the defendant appealed from this judgment on December 19, 1966 to the Supreme Court of the State of Connecticut, January Term, 1967, and

thence to November 7, 1967 when the parties appeared and were heard by the Supreme Court.

The Supreme Court having heard the parties, entered a decision on November 21, 1967, announced it on December 5, 1967, in which the foregoing judgment was set aside and the case remanded with direction to render judgment that the damages to which the plaintiffs are entitled are $139,000, not $188,000.

Thence the plaintiffs filed on December 11, 1967, a Motion to Reargue which was denied by the Supreme Court on December 19, 1967, and thence to January 19, 1968 when the motion of the defendant for judgment in accordance with the opinion of the Supreme Court was granted by this court.

Whereupon it is adjudged that the deficiency and interest due to the plaintiffs for taking of said land is $59,721.20 together with costs taxed at $2,498.38 which costs include appraisal fees in the amount of $2,300.00.

By The Court

Clerk.

January 19, 1968.

APPENDIX F

SECTION 13a-73b, CONNECTICUT GENERAL STATUTES.

(b) **CONDEMNATION.** The commissioner may take any land he finds necessary for the layout, alteration, extension, widening, change of grade or improvement of any state highway and the owner of such land shall be paid by the state for all damages and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The assessment of such damages and of such benefits shall be made by the commissioner and filed by him with the clerk of the superior court in the county in which the land affected is located, and such clerk shall give notice of such assessment to each owner of land affected thereby by mailing to each a copy of the same, postage prepaid, and, at any time after such assessment has been made by said commissioner, the physical construction of such layout, alteration, extension, widening, change of grade or other improvement may be made.

APPENDIX G

SECTION 13a-76, CONNECTICUT GENERAL STATUTES.

Any person claiming to be aggrieved by the assessment of such special damages or such special benefits by the commissioner may, at any time within six months after the same has been so filed, apply to the superior court for the county within which such land is situated or, if said court is not in session, to any judge thereof for a reassessment of such damages or such benefits so far as the same affect such applicant, and said court or such judge, after causing notice of the pendency of such application to be given to said commissioner, shall appoint a state referee to make such reassessment of such damages or such benefits. Such referee, having given at least ten days' notice to the parties interested of the time and place of hearing, shall hear the applicant and said commissioner, shall view the land and take such testimony as such referee deems material and shall thereupon reassess such damages and benefits so far as they affect such applicant and forthwith report to the court. If the amount of the reassessment of such damages awarded to any such property owner exceeds the amount of the assessment of such damages by the commissioner for such land, said court or such judge shall award to such property owner such appraisal fees as said court or such judge determines to be reasonable. Such report may be rejected for any irregular or improper conduct in the performance of the duties of such referee. If the report is rejected, the court or judge shall appoint another referee, and such referee shall proceed in the

manner in which the referee first appointed should have proceeded. If the report is accepted, such assessment shall be conclusive upon such owner and the state. If no appeal to the supreme court of errors is filed within the time allowed by law, or if one is filed and the proceedings have terminated in a final judgment finding the amount due the landowner, the clerk shall send a certified copy of the assessment of the commissioner and of the judgment to the comptroller, who shall, upon receipt thereof, draw his order upon the treasurer in favor of the landowner for the amount due him as damages. The pendency of any such application for reassessment shall not prevent or delay the layout, extension, alteration, widening, change of grade or other improvement of any such highway.

APPENDIX H

PERTINENT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT, U. S.

APR 26 1960

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

GEORGE SEFERI, ET AL,

Appellants

vs.

HOWARD S. IVES,
STATE HIGHWAY COMMISSIONER.

Appellee

No. 1241

On Appeal from The Supreme Court
of the State of Connecticut

MOTION TO DISMISS OF APPELLEE.

ROBERT K. KILLIAN,
Attorney General

JACK RUBIN,
Assistant Attorney General

CLEMENT J. KICHUK
Assistant Attorney General

30 Trinity Street
Hartford, Connecticut

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IN THE

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GEORGE SEFERI, ET AL,

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vs.

HOWARD S. IVES,
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Appellee

On Appeal from The Supreme Court
of the State of Connecticut

MOTION TO DISMISS OF APPELLEE.

I.

MOTION TO DISMISS.

The appellee respectfully moves that this appeal be dismissed for the following reasons:

1. The federal question sought to be reviewed was not properly raised by these appellants in the presentation of their defense to the appeal in the Supreme Court of the State of Connecticut and was not expressly passed on at that time by said Court.

2. This appeal does not present a substantial federal question.

3. The question of compensation to the owner for the value of a business destroyed as a result of a condemnation has been expressly decided by the Supreme Court of the United States.

I.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT PROPERLY RAISED OR EXPRESSLY PASSED ON.

The appellants contend that the Fifth and Fourteenth Amendments to the Constitution of the United States require the State of Connecticut to pay to the owner the value of a business destroyed as a result of a condemnation. It is significant, however, that nowhere in their brief filed in the subject appeal to the Supreme Court of the State of Connecticut, did the appellants expressly set forth and brief this argument now being alleged as the basis of their federal question presented to the Supreme Court of the United States. It is in the last paragraph of the Conclusion set forth in the appellants brief that the solitary invocation is made of the provisions of the Fifth Amendment to the United States Constitution. (Brief p. 14 to Supreme Court of Connecticut, reprinted on p. 7 of appellants' jurisdictional statement.)

After the oral arguments were fully heard by the Supreme Court of Connecticut, and the decision of that court was announced, these appellants, thereafter, filed their Motion to Reargue. (Appendix C of Appellants' Jurisdictional Statement). An examination of the Motion indicates that at this point these appellants had decided to seek the opportunity to argue the federal issues, as therein presented, which they failed to include in their brief. Since the Motion to Reargue introduced the federal question for the first time, the Supreme Court of Connecticut was not bound to consider it. Our state Supreme Court has repeatedly stated that claims of error not pursued in a brief are considered abandoned and will not be decided. *Monahan v. Montgomery*, 153 Conn. 386, 389; *Canterbury Realty Co. v. Ives*, 153 Conn. 377, 380; *William Peck Lumber Co. v. Virnides, Inc.*, 153 Conn. 710, 712. And most recently, in *Frederick W. Wood, et al v. Town*

of Wilton, 29 Conn. L.J. No. 42, p. 18. It was incumbent upon these appellants to properly brief the support of their argument by timely presentation of same to that court in order to receive its consideration. Furthermore, since the federal question presented in this appeal was not briefed by either party, the Supreme Court of Connecticut did not expressly pass on it.

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The appellants' claim that the questions presented are substantial finds no support in the vast majority of the court decisions and opinions of recognized authorities which have considered the question of damages to business or loss of goodwill resulting from condemnation of land by a sovereign. Not all elements of damages in a condemnation of land by the sovereign are constitutionally compensable. In *United States v. General Motors Corp.* 323 U.S. 373, 382, the Supreme Court of the United States ruled as follows:

> "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. . . . No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. (cases

cited). We are not to be taken as departing from the rule they have laid down, which we think sound. . . ."

And on page 382, the Supreme Court stated further:

". . . Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these, whatever remedy may exist lies with Congress."

This decision sets forth the rule which applies to the issues claimed by these appellants.

In an earlier case, *Mitchell v. United States,* 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644, the government condemned land as a proving ground for military purposes. The plaintiffs had used their land in the business of growing and canning corn of a special grade. The establishment of the proving ground resulted in withdrawing the available lands adapted to growing the particular quality of corn so that the plaintiffs could not reestablish their business elsewhere. The plaintiff received compensation for the land and improvements but no allowance was made for the loss of the business. This denial of recovery was upheld by the Supreme Court, Brandeis, J. saying:

"There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land. There can be no recovery under the Tucker Act if the intention to take is lacking."

Our case is not the same as an intentional acquisition of a business by a condemnor. In *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 69 Sup. Ct. 1434, 93 L. Ed. 1765, 7 ALR 2d 1280, the United States Government acquired the petitioner's laundry plant which it continued to operate as a laundry for army personnel using most of the petitioner's 180 employees. Condemnation petition was filed on November 21, 1942 for a period expiring June 30, 1943, to be extended from year to year at the election of the Secretary of War. The property was finally returned to its owner on March 23, 1946. The petitioner sought damages for destruction of its "trade routes". The Supreme Court decided that the petitioner was to be paid for the destruction of its trade routes. However, the Court distinguished this case from the usual cases in which such compensation has been denied, that is, cases where only the physical property was condemned, leaving the owner free to move his business to a new location, e.g. *Bothwell v. U.S.*, 254 U.S. 231, 65 L. Ed. 238, 41 Supreme Court 74.

> "In such a situation there is no more reason for a taker to pay for the business going-concern value than there would be for a purchaser to pay for it who had not secured from his vendor a covenant to refrain from entering into competition with him. It is true that there may be loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will, and that such loss. . . . is denied compensation as consequential. See *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 676, 67 L. Ed. 1167, 1174, 43 Supreme Court 684. . . . When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may jus-

tifiably be excluded. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. *Mitchell v. U.S.*, 267 U.S. 341, 69 L. Ed. 644, 455 Conn. 293." *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 11-12.

All of the recognized authorities do not support the appellant's claim.

In this respect Orgel, in Vol. 1 (1953 edition) Section 78, pages 334-335 states the following regarding compensation for loss of business:

> ". . . the 'taken or damaged' clause in the state constitutions has uniformly been construed to give the owner no claim which he would not possess under a mere 'taken' clause. Even under the broader clause, the distinction is universally drawn between compensation for damage to *property* and compensation for damage to *business*. While the courts differ as to the extent to which the "damaged" clause requires compensation for 'consequential damages' to property, they are all agreed that it does not extend to damages to business. The compensation awarded under the 'taken or damaged' clause is almost without exception recovered in terms of depreciation in market value and the adherence to this standard necessarily excludes the independent consideration of damages expressed . . ., in terms of financial outlays imposed on an owner or in terms of lost opportunity to secure an income."

Orgel again states in Vol. 1, Sec. 75, pages 325-326:

> "There has been general agreement in the American cases that the owner may not receive compensation for loss of good will apart from the market value of the land taken even though there is no doubt that the good will

> has been substantially damaged. . . . we find the courts giving two principal reasons for this rule. One is that the law requires compensation for damage to property but not to business since it is the real property but not the business that is taken. The other reason is that loss of good will is too speculative to be considered."

In his summary, Orgel ibid, S 78 pp. 333-334 sets forth the following as a possible explanation why the courts almost uniformly refuse to give recovery for loss of business or goodwill:

> ". . . Sometimes, the courts mean, as in the case of loss of good will, that it is difficult to affirm positively that any loss will result from the taking. At other times, the courts mean that pecuniary extent of the loss cannot be accurately determined. But it seems plausible that the underlying basis of this argument is the feeling that to permit recovery for these losses would make it impossible to estimate in advance the probable cost of the property appropriated and would thus deter or discourage public improvements. The denial of compensation and the strict adherence to the market value standard in these cases is thus seen to be a mode of compromising or adjusting the conflict between the community's interest in public improvements and the principle of complete indemnity to the owner."

Our argument is further supported by another eminent authority. Nichols on Eminent Domain, Vol. 4, Third Edition, § 13.3 et seq. states as follows:

> "An established business or what is called 'good will' has never been held to be by itself property in the constitutional sense. When a piece of real estate upon which an established business is carried on is taken for the public

use, it often happens that the proprietor of the business is unable to secure an equally available site in the neighborhood. By the interruption of his business and the removal thereof to a considerable distance away, he may lose the greater part of his customers and never be able to regain his standing in the business community. If he is the owner of the land taken the jury may partly compensate him by giving him a liberal award for the land, but if he is a mere tenant, especially if there is an eminent domain clause in his lease, he may not receive a dollar.

While it may be an added element of value to a particular piece of land taken, a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution undertakes to protect absolutely. Although in some cases the destruction of an established business works a much greater hardship than many injuries for which the constitution makes compensation necessary, the diminution of its value is considered a vaguer injury than the type of taking or appropriation with which the constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted or by a change in the location of a railroad station, a subway entrance, or even a transfer point for street cars, as well as by competition, but there would be as little claim in the one case as in the other.

The case is no different when the business is destroyed by the taking of land on which it was conducted. It is well settled that when land occupied for business purposes is taken by eminent domain, the owner or occupant is not entitled to recover compensation for the destruction of

his business or the injury thereto by its necessary removal from its established location. Furthermore, as the business is something entirely distinct from the market value of the land upon which it is conducted, it is not considered in determining the value of such land except so far as it illustrates one of the uses to which the land taken may be put. The reasons for this rule are doubtless sound. Any modification of this rule might lead to countless claims for damages, some fraudulent and all difficult to appraise fairly. But unquestionably the rule sometimes works great hardship."

In conclusion we may add that the value of a business and the profits derived therefrom may and often are the result of a combination of factors and circumstances other than the location of the land upon which the business is conducted. The financial success and stability of the business, in most instances, reflects the degree of acumen, integrity and even personality of the operator; such personal attributes create a greater portion of the value of the business than is created by the location of the premises upon which the business is operated. Furthermore, the state as condemnor has not "taken" the business operator's ingenuity and business acumen or deprived him of his ability to engage in a business at any other location not taken by the State. Therefore, the State should not be required to pay for anything other than the real property actually taken. In this respect, it is important to note that the State Highway Commissioner is empowered by Statute to take only land. Section 13a-73b, Connecticut General Statutes. (Appendix A). It is an undisputed fact in our case that pursuant to such authority limited to the acquisition of land the highway commissioner took land only and did not take nor did he intend to acquire the retail business owned and conducted thereon by these appellants.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the appeal of these appellants to the United States Supreme Court be dismissed and that this Motion to Dismiss be granted.

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General

JACK RUBIN
Assistant Attorney General

CLÉMENT J. KICHUK
Assistant Attorney General

APPENDIX A

SECTION 13a-73b, CONNECTICUT GENERAL STATUTES.

(b) CONDEMNATION. The commissioner may take any land he finds necessary for the layout, alteration, extension, widening, change of grade or improvement of any state highway and the owner of such land shall be paid by the state for all damages and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The assessment of such damages and of such benefits shall be made by the commissioner and filed by him with the clerk of the superior court in the county in which the land affected is located, and such clerk shall give notice of such assessment to each owner of land affected thereby by mailing to each a copy of the same, postage prepaid, and, at any time after such assessment has been made by said commissioner, the physical construction of such layout, alteration, extension, widening, change of grade or other improvement may be made. (February, 1965, P.A. 309, S 1).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SEFERI ET AL. *v.* IVES, STATE HIGHWAY COMM'R.

APPEAL FROM THE SUPREME COURT OF CONNECTICUT.

No. 1241. Decided May 20, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.